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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:	)	R-13-0009
	)	
PETITION TO AMEND RULE 32.5,	)	ARIZONA PROSECUTING ATTORNEYS'
ARIZ. R. CRIM. P	)	ADVISORY COUNCIL'S COMMENTS TO
	)	PETITION TO AMEND RULE 32.5, ARIZ.
	)	R. CRIM. P
	)	
	)	

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits  
comments to the Petition to Amend Rule 32.5, Ariz. R. Crim. P.

Respectfully submitted this XX<sup>th</sup> day of May, 2013.

SHEILA S. POLK  
YAVAPAI COUNTY ATTORNEY  
Chair, ARIZONA PROSECUTING  
ATTORNEYS' ADVISORY COUNCIL

ELIZABETH ORTIZ, APAAC  
Executive Director

BY: \_\_\_\_\_  
SHEILA S. POLK,  
Chair, APAAC

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2 **I. Preface**

3 APAAC hereby submits its comments in opposition to R-13-0009 Petition to Amend  
4 Rule 32.5 of the Arizona Rules of Criminal Procedure to add “appearing pro se” after the  
5 word “defendant” in the first sentence of the rule, which currently reads as follows:  
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7 The defendant shall include every ground known to him or her for  
8 vacating, reducing, correcting or otherwise changing all judgments or  
9 sentences imposed upon him or her, and certify that he or she has done so.

10 **II. General Observations Regarding the Proposed Rule**

11 **E.R. 1.2**

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13 Grounds for this change include unnamed “problems” of which this Court is alleged to  
14 be “aware” however the petition does not provide any detail about these “problems.” It does  
15 allege an ethical conflict under ER 1.2 by asserting the inability of defense counsel under the  
16 rule to “winnow the grounds he raises in accordance with effective appellate representation.”  
17 (Petition, at 1, 2.)

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19 The Petition cites to E.R. 1.2(a) for the proposition that “a lawyer shall abide by a client’s  
20 decisions concerning the objectives of representation,” and posits that if the defendant’s  
21 “legal goal” is constrained to a sentence reduction, then counsel would theoretically violate  
22 the ethical rule for raising claims relating to the validity of the underlying conviction.  
23 (Petition, at 2.) This is a false ethical dilemma. E.R. 1.2(a) reads, in its entirety, as follows:  
24

25 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a  
26 client’s decisions concerning the objectives of a representation, and, as  
27 required by ER 1.4, shall consult with the client as to the means by which  
28 they are to be pursued. A lawyer may take such action on behalf of the  
client as is impliedly authorized to carry out the representation. A lawyer

1 shall abide by a client's decision whether to settle a matter. *In a criminal*  
2 *case*, the lawyer shall abide by the client's decision, after consultation  
3 with the lawyer, as to a plea to be entered, whether to waive jury trial and  
4 whether the client will testify. (Emphasis added.)

5 In a criminal case, by the plain language of E.R. 1.2(a), the only decisions over which the  
6 defendant has absolute control are: 1) the plea to be entered; 2) whether to waive a jury trial;  
7 and 3) whether to testify. All other decisions are left to the discretion of an attorney. See  
8 *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984) (courts indulge in a strong  
9 presumption that counsel's conduct falls within wide range of reasonable professional  
10 assistance; that is, that the attorney's actions are considered sound trial strategy under the  
11 circumstances). See also, *State v. Jones*, 197 Ariz. 290, ¶ 51, 4 P.3d 345 (2000) (counsel,  
12 acting alone, may make decisions of strategy pertaining to the conduct of the trial, and  
13 defendant are often bound by their counsel's strategy decisions).

14 Indeed, that is the expected role of an appellate attorney. See, *State v. Febles*, 210 Ariz.  
15 589, ¶ 19, 115 P.3d 629 (App. 2005) ("Appellate counsel is responsible for reviewing the trial  
16 record and for evaluating and selecting the most promising issues to present on appeal.").  
17 See also, *State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1382 (App. 1996). It is an  
18 acceptable exercise of professional judgment for an attorney to winnow out weaker arguments  
19 on appeal and focus on those more likely to prevail. *Febles*, at ¶ 20, citing, *Jones v. Barnes*,  
20 463 U.S. 745, 751-52, 103 S.Ct. 3308 (1983). The function and discretion of an attorney to  
21 make strategic decisions regarding the winnowing of issues continues on collateral review,  
22 particularly given the limited nature of Rule 32 proceedings.

23 While direct appeal is entirely record based, Rule 32 contains a requirement  
24 for the defendant to certify that a petition contains all the grounds known to the  
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1 defendant. This is illustrated by the comment to Rule 32.5(a), which reads, in  
2 pertinent part:

3  
4 The rule requires the petitioner to list every ground for relief known to him  
5 and to verify under oath that he has done so. This is intending to encourage  
6 consolidation of all claims into a single proceeding and to evidence knowing  
7 and intelligent relinquishment of claims known but not made. See, Rule 32.2.

8 In other words, the rule requires the defendant to provide his post-conviction counsel  
9 with all the facts known to him that would aid his attorney in raising all colorable claims, and  
10 to certify that he has done so. To do otherwise eviscerates the narrow function of a Rule 32  
11 proceeding.

12 If a defendant is permitted to withhold information from his Rule 32 counsel that is  
13 outside the record and would form the basis for a colorable ground for relief, he should be  
14 precluded under Rule 32.2 from raising such a ground in a second or successive petition for  
15 post-conviction relief. Nevertheless, the defendant could later petition a federal court for relief  
16 by alleging that the post-conviction attorney's decision not to raise such a ground constitutes  
17 "cause" to excuse the procedural default. See *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309  
18 (2012). This thwarts not only Arizona's post-conviction proceedings, but the constitutional  
19 guarantee to Arizona crime victims of a "prompt and final conclusion" to criminal cases after a  
20 conviction and sentence. See, Ariz. Const. Art. II, § 2.1(A)(10).

21  
22 As this Court has recognized, "[t]he insistence on compliance with Rule 32 is not a mere  
23 formality," and this Court has "consistently required *that parties 'strictly comply' with the rule*  
24 *in order to be entitled to relief.*" *Canion v. Cole*, 210 Ariz. 598, ¶ 11, 115 P.2d 1262 (2005),  
25 quoting *Carriger*, 143 Ariz. at 146.  
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1           **E.R. 3.1**

2           The Petition also contends that the certification requirement of Rule 32.5(a) poses an  
3 ethical dilemma under E.R. 3.1 for post-conviction defense counsel who do not wish to include  
4 in the petition “meritless” claims that a defendant believes have merit. (Petition, at 2.) E.R.  
5 3.1 reads as follows:  
6

7           A lawyer shall not bring or defend a proceeding, or assert or controvert an  
8 issue therein, unless there is a good faith basis in law and fact for doing so  
9 that is not frivolous, which may include a good faith and nonfrivolous  
10 argument for an extension, modification or reversal of existing law. A  
11 lawyer for the defendant in a criminal proceeding, or the respondent in a  
12 proceeding that could result in incarceration, may nevertheless so defend  
13 the proceeding as to require that every element of the case be established.

14           By the plain language of Rule 32.1 “grounds” for relief are explicitly defined and are  
15 very narrow and would not include meritless, frivolous assertions by a represented defendant.  
16 Moreover, Rule 32.2(a) further reduces “grounds” raisable (and must be certified to by a  
17 represented defendant under Rule 32.5(a)) by precluding otherwise meritorious grounds that  
18 have previously been adjudicated, or could have previously properly been adjudicated. Thus,  
19 “grounds” asserted by a represented defendant with which his post-conviction counsel  
20 disagrees will be either precluded or not “colorable” under the rule. There is no compelled  
21 ethical dilemma under E.R. 3.1.

22           Requiring a criminal defendant to certify that he has included (and/or informed his  
23 attorney of) all such narrow circumstances within his knowledge serves the purpose of both  
24 Rule 32 and the Arizona Victim’s Bill of Rights.  
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1 **III. Conclusion**

2 APAAC opposes the Petition as the ethical dilemmas alleged are simply not supported.

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4 Respectfully submitted this XX<sup>th</sup> day of May, 2013.

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6 SHEILA S. POLK  
7 YAVAPAI COUNTY ATTORNEY  
8 Chair, ARIZONA PROSECUTING  
9 ATTORNEYS' ADVISORY COUNCIL

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11 BY: \_\_\_\_\_  
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13 Chair, APAAC  
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